

4.4.4-1 INTRODUCTION

This chapter describes potential impacts of the Project to navigable waters. The chapter describes the existing waterbodies in the Project area, and provides an assessment of the Project with respect to the navigability of these waterbodies.

4.4.4-2 METHODOLOGY

The analysis of potential effects on navigable waterways was based on a review of pertinent state and federal regulatory requirements; maps of the area prepared by the New York State Department of Environmental Conservation (NYSDEC), U.S. Coast Guard (USCG), and U.S. Army Corps of Engineers (USACE); and field reconnaissance.

The definition of “navigable waterways” varies according to the federal or state regulatory agency with jurisdiction. The following regulations may apply for the Portageville Bridge Project:

- ***Protection of Waters, Article 15, Title 5, New York State Environmental Conservation Law (ECL), Implementing Regulations 6 NYCRR Part 608:*** According to New York State regulations, a Protection of Waters permit is required for “excavation or placement of fill” in navigable waters of the state. This can include placement or installation of structures such as supports for bridge piers as well as construction excavation. The regulations define New York State’s navigable waters to include “lakes, rivers and other waterways and water bodies on which water vessels with a capacity of one or more persons are operated or can be operated notwithstanding interruptions to navigation by artificial structures, shallows, rapids or other obstructions, or by seasonal variations in capacity to support navigation.” As discussed in Chapter 4.1 of the DEIS, Norfolk Southern is not subject to certain state and local regulations and permit requirements, because of pre-emption established by federal law to avoid barriers to interstate commerce. Nonetheless, Norfolk Southern will comply with these state and local regulations when feasible and appropriate.
- ***Rivers and Harbors Act of 1899:*** The federal Rivers and Harbors Act of 1899 requires authorization for a number of different activities in navigable waters of the United States. The purpose of this Act is to preserve the public right of navigation and to prevent interference with interstate and foreign commerce.

Section 9 of the Act requires a permit for “construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States.” (33 USC § 401) The Secretary of the Army acting through USACE has jurisdiction over dams and dikes, while the U.S. Department of Homeland Security acting through USCG has jurisdiction over bridges and causeways. For USCG bridge permitting purposes, a navigable waterway is defined in USCG regulations at 33 CFR § 2.36 (formerly Subpart 2.05-25), among other things, as 1) “internal waters of the United States that are subject to tidal influence”; and 2) “internal waters of the United States not subject to tidal influence that . . . are or have been used, or are or have been susceptible for use, by themselves or in connection with other waters, as highways for substantial interstate or foreign commerce, notwithstanding natural or man-made objections that require portage.”

Section 10 of the federal Rivers and Harbors Act of 1899 requires authorization from the Secretary of the Army acting through USACE for: 1) the construction of any structure in or affecting any navigable waters of the United States; 2) the excavation from or deposition of material in these waters; or 3) any obstruction or alteration in these waters. (33 USC § 403) Any structures placed in navigable waters—such as pilings, piers, or bridge abutments up to the mean-high-water line—are regulated pursuant to Section 10. USACE regulations (33 CFR Subpart 329.4) define navigable waters as “those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.”

4.4.4-3 EXISTING CONDITIONS

The Project area crosses the Genesee River and an unnamed tributary of the Genesee River. As discussed in Chapter 4.4.2, “Surface Waterbodies and Watercourses,” the Genesee River is a NYSDEC-mapped stream (Ont. 117-3.1), designated a Class B waterbody with Class B water quality standards. The unnamed tributary in the Project area is located at the western end of the study area and passes under the railroad right-of-way via a stone culvert. This stream is identified as “Stream B” in the Wetlands and Waterways Delineation Report conducted for this Project (see **Appendix A**). Based on NYSDEC mapping, this stream (Ont. 117-91) is identified as Class B with B water quality standards (see Chapter 4.4.2).

4.4.4-3-1 State Regulated Waters

The Genesee River through Letchworth State Park meets the definition of a navigable water body as set forth in NYSDEC’s regulations. Boating activities in the immediate vicinity of the Project site are limited due to the presence of the Upper Falls immediately north of the Portageville Bridge as well as the Middle and Lower Falls within 2 miles downstream. However, recreational boating opportunities are located at Lee’s Landing within Letchworth State Park, approximately 4 miles north of the Project site, downstream of the three waterfalls.

Stream B does not meet NYSDEC’s definition of navigable water, because it is too shallow to support navigation.

4.4.4-3-2 Office of General Services Lands and Navigable Waters

The area of the Genesee River over which the existing bridge passes (and over which the proposed bridge would pass) is not under the jurisdiction of the New York State Office of General Services (OGS).

4.4.4-3-3 Rivers and Harbors Act—Section 9

The Genesee River and Stream B in the Project area are not navigable waterways as defined by USCG regulations, because they are neither subject to tidal influence nor used to transport substantial interstate or foreign commerce. Since the Project does not involve the construction or modification of any bridge, dam, dike, or causeway over any navigable water of the United States as defined by the USCG, Section 9 of the Safe Rivers and Harbors Act does not apply. In addition, pursuant to correspondence with USCG for the Project, “a Coast Guard Bridge Permit will not be required for the proposed construction project in accordance with the Coast Guard Authorization Act of 1982. This Act states that a permit is not required (if so determined by the U.S. Coast Guard) for bridge construction over navigable U.S. Waterways that do not presently carry foreign and interstate commerce, are not susceptible to reasonable improvement to carry such commerce, and are non-tidal waters.” (W. Stanifer, USCG, December 23, 2008; provided in **Appendix A**.)

4.4.4-3-4 Rivers and Harbors Act—Section 10

The Buffalo District of USACE considers the Genesee River to be navigable from its mouth at Lake Ontario to Black Creek, which is about 119 miles upstream at Belfast, New York. This stretch of the Genesee River includes the portion that flows through Letchworth State Park. This is most likely because of the river's use in the past, in combination with the nearby canal, to transport interstate commerce. The Genesee Valley Canal (1836-1878) improved the river and was used for navigation through the Project site.

Although still classified as a navigable waterway by USACE, safe navigation is not possible along the portion of the Genesee River within Letchworth State Park. The improvements which made the Genesee River navigable were abandoned in 1880, and the presence of the three waterfalls and the Mt. Morris Dam located downstream of the Portageville Bridge impede safe navigation through the area. Nonetheless, Section 10 of the Rivers and Harbors Act still applies to the Genesee River in Letchworth State Park.

Stream B is not listed as a navigable water of the United States and is not a navigable waterway as defined by the USACE regulations because it: 1) was never used in the past, and is not being used or susceptible for use, to transport interstate commerce; and 2) is not subject to the ebb and flow of tide.

4.4.4-4 EFFECTS ASSESSMENT

4.4.4-4-1 No Action Alternative

The No Action Alternative would not affect the Genesee River, which is considered by the State of New York and the USACE as a navigable waterway. This alternative would not require excavation or placement of fill below the mean high water level. Therefore, this alternative would not affect the navigability of the river and would not require state or federal permits related to navigable waters.

4.4.4-4-2 Preferred Alternative

Although the river is considered by New York State and the USACE as a navigable waterway, boating (i.e., navigation) activities in the vicinity of the Project site are limited due to the presence of the Upper Falls immediately north of the Portageville Bridge. The Preferred Alternative would involve the construction of a new bridge over the Genesee River and removal of the old bridge. Construction of the new bridge would not be staged from the river, but a temporary work trestle/causeway would be placed within the river during the construction of the new bridge and demolition of the piers for the old bridge. The proposed steel deck arch bridge would be keyed into the bedrock of the gorge at an elevation of approximately 80 feet above the normal water level. No in-water piers would be required for the new bridge.

Once construction is complete, the new bridge would be high above the river gorge (with supports from the cliff at approximately 80 feet above the normal water level) and would be a steel arch span without any supports in the river. This would not interfere with navigation on the Genesee River.

The installation of the temporary work trestle/causeway and removal of the existing bridge piers in the river would require authorization under Section 10 and Section 404 from the USACE, and Section 401 water quality certification from the NYSDEC. The removal of the existing bridge piers would not adversely affect navigation on the Genesee River, since none occurs in the immediate vicinity of the Project site.

4.4.4-5 SUMMARY OF MITIGATION

As discussed above, the Project would not adversely affect navigation in the Genesee River. To avoid and minimize the potential for adverse impacts on the Genesee River from the temporary work trestle/causeway and removal of the existing bridge piers, the Project would require authorization from the USACE under Section 10 and Section 404, and from the NYSDEC under Section 401, and would adhere to the requirements and conditions set forth in the permits. Typically, such requirements involve avoiding changes to clearance for boats and other such impedance to navigation.